No. 21-40137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAUREN TERKEL; PINEYWOODS ARCADIA HOME TEAM, LIMITED; LUFKIN CREEKSIDE APARTMENTS, LIMITED; LUFKIN CREEKSIDE APARTMENTS II, LIMITED; LAKERIDGE APARTMENTS, LIMITED; WEATHERFORD MEADOW VISTA APARTMENTS, L.P., MACDONALD PROPERTY MANAGEMENT, L.L.C.

Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION; SHERRI A. BERGER, IN HER OFFICIAL CAPACITY AS ACTING CHIEF OF STAFF FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES OF AMERICA

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas

APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO DISMISS

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Mere weeks before oral argument in this case, Appellants, the Center for Disease Control, et. al (hereafter, the "federal government"), seek to dismiss its appeal. Ordinarily, there is no reason to oppose a voluntary dismissal, as it is usually designed to end the case, leaving the district court judgment in place. But this is no ordinary dismissal. The federal government's request is intended to avoid appellate review so that it can challenge the district court's judgment on the merits below and restart the entire litigation process anew, hoping for a better result the second time around. App. MTD, p. 3-4 (claiming that the federal government has a basis to modify the judgment below and "reserve the right to make such a request of the district court"). Such a pretextual dismissal of a live case at the eleventh hour would be a misuse of judicial resources and ignores traditional rules of appellate standing. *See Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047, 1051 (5th Cir. 1969).

The merits of this case are fully briefed in this Court, the federal government continues to contest the validity of the district court's judgment, and Appellants claim to reserve the option to have the district court's judgment altered or vacated. App. MTD, p. 3-4. Accordingly, this remains a live case and the government's request for a pretextual dismissal to relitigate this issue in the district court should be denied. *See, Knox v. SEIU, Local 1000,* 567 U.S. 298, 307 (2012)*; City of Mesquite v. Aladdins Castle*, 455 U.S. 283, 289 (1982). If the federal government

believes subsequent case law has called the district court's judgment into question, the proper venue for those arguments is this Court.

PROCEDURAL HISTORY

Appellees are residential landlords who were prohibited from evicting tenants due to the CDC's eviction moratorium. Appellees sued both the CDC and the United States seeking: (1) a declaration that the eviction moratorium exceeded the federal government's authority under the Commerce Clause, (2) an order under 5 U.S.C. § 706(2)(B) setting the eviction moratorium aside, and (3) a permanent injunction enjoining enforcement of such moratoria in the future. ROA 30-31. The district court entered a final judgment awarding the first two requests for relief. ROA 1686. But relying upon representations[1] made by the federal government at oral argument, the district court elected not to issue an injunction against the federal government. ROA 1684-85.

Immediately after filing its notice of appeal divesting the district court of jurisdiction, the federal government reneged on its pledge. Not only did the government continue to enforce the moratorium that the district court had set aside under 5 U.S.C. § 706(2)(B), but it also extended (or re-adopted) substantially

[1] The government's attorney pledged during oral argument that the federal government would abide by any declaratory judgment and injunctive relief was therefore unnecessary:

"MS. VIGEN: I believe if the action were held unconstitutional and declared unconstitutional, that would serve -- that would require the agency to stop taking that action. The agency can't take action that's unconstitutional, Your Honor." ROA 1769

identical moratoria several more times. *See*, Section 502 of Title V, Division N of the Consolidated Appropriations Act, 2021 (first extension); 86 Fed. Reg. 8,020 (Feb. 3, 2021) (second extension); 86 Fed. Reg. 16,731 (March 31, 2021) (third extension).

Several months later, a separate district court entered a separate judgment that the then-current eviction moratorium order exceeded the CDC's statutory authority. *Ala. Ass'n of Realtors v. United States HHS*, No. 20-cv-3377 (DLF), 2021 U.S. Dist. LEXIS 85568, at *26 (D.D.C. May 5, 2021) (*AAR*). That district court also set aside the then-current moratorium but stayed its judgment pending appeal. *Ala. Ass'n of Realtors v. United States HHS*, No. 20-cv-3377 (DLF), 2021 U.S. Dist. LEXIS 92104, at *14 (D.D.C. May 14, 2021). After two trips to the Supreme Court, that stay was lifted. *See Ala. Ass'n of Realtors v. HHS*, 29 Fla. L. Weekly Fed. S. 13 (U.S. 2021).

As the federal government acknowledges, the relief granted to the *AAR* plaintiffs was narrower than that granted to Appellees in this case. App. MTD, p. 3-4. The *AAR* court held that the CDC lacked statutory authority to enact the challenged moratorium. The judgment applied only to the challenged moratorium and only to the Department of Health and Human Services—the named party in the case. The *AAR* judgment would have no effect on a statutorily authorized

moratorium or other attempts by the federal government to implement an eviction moratorium.

By contrast, the district court in this case entered final judgment holding that the federal government —neither the CDC nor Congress— lacked authority under the Commerce Clause to enact the challenged eviction moratorium. ROA 21-40137.1686. The judgment applies to both the CDC and the United States—the named parties in this case. Indeed, the district court in *AAR* recognized this contrast, noting that "district court [in *Terkel*] declared that the federal government lacks the constitutional authority *altogether* to issue a nationwide moratorium on evictions." *AAR*, No. 20-cv-3377 (DLF), 2021 U.S. Dist. LEXIS 85568, at *9 (emphasis added).

The federal government has since dismissed its appeal in *AAR* leaving the narrow judgment of that court in place. App. MTD, p. 2. But tellingly, when it came time to dismiss this appeal involving a broader challenge to federal authority, the government repeatedly refused to affirm requests from Appellees' counsel that it would leave the district court judgment in place or agree that Appellees were prevailing parties for the purpose of attorneys' fees. The reason for this refusal is now clear. As demonstrated in its dismissal motion, the Appellants apparently intend to move to vacate the district court's judgment by motion in the district court once this appeal is dismissed. App. MTD, p. 3-4.

ARGUMENT

This Court has "broad discretion" with regard to voluntary motions to dismiss. *Noatex Corp. v. King Constr. of Hous., L.L.C.,* 732 F.3d 479, 487 (5th Cir. 2013). "Such motions are generally granted, but may be denied in the interest of justice or fairness." *Id*. Meaningless or pretextual dismissals should not be granted. *See, e.g. id.* at 487; *Int'l Ass'n of Heat*, 407 F.2d at 1051.

For example, in *Int'l Ass'n of Heat*, 407 F.2d at 1051, certain discriminatory union practices were enjoined by a district court. The union initially appealed the injunction, but while the appeal was pending, the union discontinued the challenged practices and moved to voluntarily dismiss its appeal. *Id*. As in this case, the union continued to contest the validity of the district court's judgment, but given the discontinuation of the challenged practices, it argued that "future action could better be sought in the District Court by motion." *Id*. This Court viewed the union's clever procedural posturing with "a jaundiced eye," denied the voluntary motion to dismiss, and proceeded to affirm the district court's judgment on the merits. *Id* at 1055.

The same scrutiny is applicable here. The narrow decision in *AAR* did not moot this case. The federal government maintains an interest in overturning the broader declaratory judgment granted by the district court in this case holding that the government lacks constitutional authority to pass these sorts of moratoria, and Appellees have an interest in upholding the district court judgment below because it

protects them from future government actions. *See Camreta v. Greene*, 563 U.S. 692, 703 (2011). Nor does the government truly seek to abandon this case. Like the union in *Int'l Ass'n of Heat*, the federal government has not abandoned its position that the district court's judgment is invalid, it merely seeks to avoid review in this Court so it can raise its claims again below. App. MTD, p. 3-4. The government's approach therefore deserves the same "jaundiced eye" given to the union in *Int'l Ass'n of Heat*. Its pretextual motion to dismiss should be denied.

CONCLUSION

Therefore, Appellees respectfully request this Court deny Appellants' motion or carry the same to the October 6, 2021, oral argument. Should this Court grant Appellants' dismissal motion, Appellees request this Court set terms to: (1) stipulate that the federal government is bound by the district court judgment below, which is now final; and (2) agree that Appellees are prevailing parties for the assessment of costs and fees in the district court and on appeal. Otherwise, this remains a live controversy and the government's attempt to manipulate this Court's jurisdiction should be denied.

Respectfully submitted,

/s/Robert Henneke

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Robert Henneke
ROBERT HENNEKE

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,394 words. This response also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: September 13, 2021

/s/Robert Henneke
ROBERT HENNEKE